

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL)
DEVELOPMENT PERMIT GRANTED BY)
JEFFERSON COUNTY TO OLYMPIC SEA)
FARMS, INC.,)
SOUTH POINT COALITION,)
Appellant,)
State of Washington DEPARTMENT)
OF ECOLOGY and DEPARTMENT)
OF FISHERIES,)
Appellant-Intervenors)
v.)
JEFFERSON COUNTY and OLYMPIC)
FARMS, INC.,)
Respondents,)
and)
State of Washington DEPARTMENT)
OF NATURAL RESOURCES,)
Respondent-Intervenor)

SHB NO. 86-47

ORDER GRANTING
SUMMARY JUDGMENT

1 This matter, having come before the Board by Motion for Summary
2 Judgment filed by Appellant South Point Coalition ("South Point"), and
3 the Board having considered the following:

4 1. South Point's Motion for Summary Judgment filed March 16,
5 1987, together with Memorandum in Support and Exhibits A, B, C, D, E,
6 F (affidavit of S. Ralph), and affidavit of R. Meinig and its Exhibits
7 1, 2, 3, 4; and

8 2. Respondents Jefferson County, Olympic Sea Farms, Inc., and
9 Washington State Department of Natural Resources' Memorandum in
10 Opposition filed March 31, 1987, and Exhibits A (affidavit of K.
11 Perjancic) and B (minutes of Jefferson County Board of Commissioners'
12 meeting September 8, 1986);

13 And being fully advised, the Board finds it to be uncontested that
14 the affected Tribes, the Clallam and Skokomish Tribes represented by
15 the Point No Point Treaty Council, were not sent the County's
16 Determination of Non-significance ("DNS") and the environmental
17 checklist. Pursuant to WAC 371-08-031(2) of the Board's procedural
18 rules, and Civil Rule 56 of Superior Court, judgment as a matter of
19 law should be granted, based on that finding alone. See Moe v. DOE,
20 SHB No. 78-15 (1978). The undisputed facts are:

21 I

22 FINDINGS OF FACT

23 1. On June 16, 1987, Olympic Sea Farms, Inc. ("Olympic") filed
24 with Jefferson County an application for a shoreline substantial
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1 development permit. Olympic sought a permit to place 22 salmon net
2 pens at South Point in the Hood Canal, approximately five miles south
3 of the Hood Canal Bridge at the site of the former ferry terminal.

4 2. A Notice of Application was published in the Port Townsend
5 Leader starting June 18, 1986 and for two weeks thereafter. Notices
6 were sent to adjoining property owners and a notice was posted.

7 3. On July 21, 1986, the Jefferson County Board of Commissioners,
8 after review of the environmental checklist and other materials,
9 determined it was the lead agency for the project under SEPA, issued a
10 DNS for the project, determining that an environmental impact
11 statement was not required, and provided a comment period until August
12 6, 1987.

13 4. Neither the DNS nor the environmental checklist were sent to
14 the affected tribes, the Clallam and Skokomish Tribes represented by
15 the Point No Point Treaty Council.

16 5. The proposed project involves other agencies with jurisdiction
17 to approve or deny its placement or operation, in addition to
18 Jefferson County.

19 6. On September 22, 1987, after proceedings on September 8 and
20 15, 1987, the Jefferson County Board of County Commissioners issued a
21 conditioned Shoreline substantial development permit to Olympic Sea
22 Farms, Inc. A hearing had been held before the Jefferson-Port
23 Townsend Shoreline Management Advisory Commission on August 6, 1986 on
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1 the application, with additional Shoreline Commission proceedings that
2 same month.

3 7. On October 27, 1986, appellant South Point Coalition filed a
4 timely appeal with the Board.

5 8. A pre-hearing conference was held on December 16, 1986, before
6 Judith A. Bendor, member and presiding, with all parties represented.
7 As a result of the conference and written materials received and
8 considered, pre-hearing orders were issued. A formal hearing was
9 scheduled for May 18-27, 1987 and June 1-5, 1987.

10 9. On March 16, 1987, Appellant's Motion for Summary Judgment was
11 filed. The Memorandum in Opposition was filed on March 31, 1987.

12 10. The Board reviewed the file herein, deliberated, and
13 authorized that the presiding member deliver an oral opinion to the
14 parties for their convenience. This was done by telephone conference
15 on April 17, 1987; all parties were represented.

16 From the facts, the Board reaches the following legal conclusions:

17 II

18 CONCLUSIONS OF LAW

19 1. Jefferson County is the lead agency which issued the DNS,
20 determined that an EIS should not be prepared, and provided a comment
21 period on that decision. The County failed to notify affected Clallam
22 and Skokomish Tribes of this decision, thereby violating the mandatory
23 requirements of WAC 197-11-340(2)(b) which states:

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1 The responsible official shall send the DNS and
2 environmental checklist to agencies with jurisdiction, the
3 department of ecology, and affected tribes, and each local
4 agency or political subdivision whose public services
would be changed as a result of implementation of the
proposal, and shall give notice under 197-11-510.
(Emphasis added)

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6 2. A key goal of the State Environmental Policy Act
7 ("SEPA") is to ensure that governments plan, decide, and
8 implement the substantive provisions of the Act after being
9 informed of environmental concerns. RCW 43.21C.020(2),
10 43.21C.110(1)(e) and (1); See Settle The Washington State
11 Environmental Policy Act (1987) section 5(d) p. 33.

12 3. SEPA is a statute which places a heightened emphasis
13 on clear procedures geared to informed governmental
14 decision-making. Providing notice of a proposed action is
15 central to ensuring participation, such that governments have
16 the opportunity to engage in an informed process. See Glaspey
17 & Sons v. Conrad, 83 Wn.2d 707, 521 P.2d 1173 (1974).

18 4. An informed process is vitally important to the
19 integrity of SEPA, and therefore important for all
20 Washingtonians, not just for those who may not have received
21 notice and might thus be individually prejudiced. See Norway
22 Hill Preservation & Protection Association v. King County
23 Council, 87 Wn.2d 267, 552 P.2d 674 (1976). This Board's
24 Order, founded on SEPA, therefore does not and need not

1 address whether prejudice to a particular party may have
2 occurred in this instance, despite respondents' contentions to
3 this effect, e.g., Strand v. Snohomish, SHB No. 85-4 (1985).

4 5. In shorelines matters, the evidence considered by this
5 Board may differ from that considered by the local permitting
6 entity. New or additional information may be introduced. San
7 Juan County v. Department of Natural Resources, 28 Wn.App. 796
8 626 P.2d 995 (1981). However, our review function cannot
9 perform mandated procedural requirements assigned to local
10 government. This has led us, in certain cases, to invalidate
11 local decisions where notice requirements were not met, e.g.,
12 Save Flounder Bay, et al. v. City of Anacortes and Mausel, SHB
13 81-15 (1982); Schwinge v. Town of Friday Harbor, SHB 84-31
14 (1985).

15 6. The soundness of such an approach is even clearer when
16 SEPA compliance issues are part of shorelines cases. A
17 consistent theme when reviewing for SEPA compliance is an
18 insistence on procedural regularity. The emphasis is on
19 informed choice. For threshold decisions, this means that
20 prima facie compliance with the procedural requirements of
21 SEPA must occur before the deciding agency reaches its
22 ultimate decision. Sisley v. San Juan County, 89 Wn.2d 78,
23 569 P.2d 712 (1977); Norway Hill, supra; Juanita Bay Valley
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1 Community Association v. Kirkland, 9 Wn.App. 59, 510 P.2d 1140
2 (1973).

3 We conclude, therefore, that the information gathering
4 function essential to an informed threshold decision cannot be
5 performed at a later date by this Board. Strict compliance
6 with the consultation requirements of WAC 197-11-340(2)(b) is
7 necessary to the validity of a threshold decision. ¹

8 7. Respondents' claims that constructive notice has
9 occurred and therefore compliance has resulted, is ultimately
10 legally unpersuasive. The requirement to send the notice is
11 clear and unambiguous, and has not been fulfilled. The
12 unambiguous language of the regulation leaves no room for
13 construction; its plain meaning is to be given effect. See,
14 King County v. The Taxpayers of King County, 104 Wn.2d 1, 700
15 P.2d 1143 (1985); Bavarian Properties, Ltd. v. Ross, 104 Wn.2d
16 73, 700 P.2d 1161 (1985).

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19 1. Where, as here, there is more than one agency with
20 jurisdiction the responsible official's initial DNS
21 determination is merely tentative. WAC 197-11-340.
22 Other entities must be notified, provided the DNS
23 and environmental checklist, and their responses
24 considered. WAC 197-11-340(2)(b). If, after this
25 comment cycle, "significant adverse impacts are
26 likely", the DNS must be withdrawn.
27 WAC 197-11-340(2)(f). WAC 197-11-340(3)(a)(11).

1 8. Respondents' contention that affected Tribes' concerns
2 are the same as those of non-tribal gill netters is
3 speculative, unsupported by the record before the Board, and
4 ultimately legally irrelevant. The regulation requires that
5 notice to the Tribes shall be given.

6 9. Respondents' contention that newspaper articles
7 notifying the public about the permit application somehow
8 supplant WAC 197-11-340(2)(b) SEPA notice requirements for the
9 Tribes is misplaced. The WAC mandatory language requires
10 specific notice to the Tribes and to agencies, political
11 subdivisions, as well as notice under 197-11-510. In
12 addition, many of the newspaper articles cited by respondents
13 occurred on dates after the County's July 21, 1986 threshold
14 decision and DNS issuance, and even after the DNS comment
15 closure date of August 6, 1986.

16 10. Even if the Tribes might have been afforded notice
17 through the United States Army Corps of Engineers Section 10
18 Permit process, as respondents contend, such procedure in no
19 way abrogates Washington residents' rights to an informed
20 threshold decision by State or local government through State
21 Environmental Policy Act procedures.

22 11. We hold the County's failure to comply with WAC
23 197-11-340(2)(b), by failing to notify the affected Tribes
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1 about the DNS and to notify them about the opportunity to
2 comment on it, as a matter of law deprives the County of an
3 informed decision under SEPA. Therefore, the DNS shall be
4 vacated and the substantial development permit reversed and
5 remanded.

6 III

7 The Board further finds that there remain genuine issues
8 of material fact regarding the following legal issues:

9 1. Was the content of the notices of the shoreline
10 substantial development permit application, as required by
11 WAC 173-14-070, so inaccurate or otherwise defective as to
12 merit reversal? (Appellant's Issue II A.)

13 2. Did the shoreline permit application process fail to
14 provide affected Tribes notice and the opportunity to
15 comment, so as to contravene the Shoreline Management Act
16 ("SMA") or the implementing regulations, so as to merit
17 reversal under Chapter 197-11 WAC? (Appellant's Issue II
18 B.)

19 3. Did the Jefferson County Board of Commissioners fail
20 to consider the impact of the proposed net pens on
21 existing commercial fishing operations, or on navigation,
22 so as to contravene the SMA or SEPA, and thereby merit
23 reversal? (Appellant's Issue II E.)

1 4. Has the proposed project changed so substantially
2 since DNS issuance, so as to require under SEPA or WAC
3 197-11-340(3)(a) or (c) the vacating of the DNS, and a
4 remand to the County for a new threshold determination?
5 (Appellant's Issue II F.)

6 5. If errors were committed regarding notice of the
7 shoreline permit application (Appellant's Issues II A. and
8 B.), were the cumulative effects sufficient to merit
9 reversal? (Appellant's Issue II D.)

10 The Board, therefore, declines to issue Summary Judgement
11 on the above five issues.
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ORDER

Appellant's Motion for Summary Judgment is GRANTED in part, and
DENIED in part.

Jefferson County's approval of the Shoreline Substantial
Development Permit is hereby reversed and remanded for proceedings
consistent with this Order.

DONE this 26th day of May, 1987.

SHORELINES HEARINGS BOARD

Judith A. Bendor, Presiding
JUDITH A. BENDOR, Presiding

Lawrence J. Faulk 5/20/87
LAWRENCE J. FAULK, Chairman

Wick Dufford
WICK DUFFORD, Member

Nancy Burnett
NANCY BURNETT, Member

Les Eldridge
LES ELDRIDGE, Member

Dennis J. McLerran
DENNIS McLERRAN, Member